

DEC 13 1976

IN THE

**Supreme Court of the United States**

October Term, 1976

No. 76-797

MICHAEL RODAK, JR., CLERK

**RURAL FOODS, INC., etc.,***Petitioner,*

v.

**THE UNITED STATES (U.S.  
DEPARTMENT OF AGRICULTURE, etc.),**  
*Respondent.*PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**James A. Oast, Jr.**  
**Assistant U. S. Attorney**  
**U. S. Attorney's Office**  
**Federal Post Office Building**  
**Norfolk, Virginia 23510****Paul Blankenstein**  
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**Civil Division**  
**Department of Justice**  
**Washington, D. C. 20530**  
*Counsel for Respondent.***Gordon E. Campbell**  
**Wayne Lustig**  
**Campbell, Lustig & Hancock**  
**1340 Virginia National Bank Bldg.**  
**Norfolk, Virginia 23510**  
*Counsel for Petitioner*

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on the 13th day of September, 1976.

OPINIONS

The per curiam decision of the United States Court of Appeals for the Fourth Circuit, while not reported, is appended.

As the decision below was per curiam, the opinions and orders of the United States District Court for the Eastern District of Virginia, Norfolk Division, on the issues involved herein are similarly appended.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered in this cause on the 13th day of September, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

1. Did the United States Court of Appeals for the Fourth Circuit properly reverse the United States District Court for the Eastern District of Virginia, Norfolk Division, when said United States Court of Appeals for the Fourth Circuit held that the District Court's reduction of the penalty imposed upon petitioner under the Food Stamp Program was not proper and that the District Court's determination of the "reasonableness of the penalty imposed"

was not warranted by the scope of review and tests for review articulated in Cross v. United States, 512 F.2d 1212 (4th Cir. 1975)?

2. In light of the United States District Court's decision, was the United States Court of Appeals for the Fourth Circuit justified in holding as a matter of law that the reduction of the one-year period of disqualification was beyond the authority of the United States District Court under the facts and circumstances of review undertaken by the United States District Court?

3. Is the decision of the United States Court of Appeals for the Fourth Circuit in Cross v. United States, supra, a proper method of review for violations of the Food Stamp Act of 1964, 7 U.S.C. § 2201, et seq., when said decision is compared with the decision in other jurisdictions, Martin v. United States 459 F.2d

300 (6 Cir. 1972), and were the tests enunciated in the Cross decision, supra, properly applied in this case?

#### STATUTES INVOLVED

1. 5 U.S.C. § 706 (2) (F) which provides:

"The reviewing court shall ... (2) hold unlawful and set aside agency action, findings and conclusions found to be ... (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

2. 7 U.S.C. § 2022 provides:

"Whenever--

(a) ....

(b) a retail food store or a wholesale food concern is disqualified under the provisions of section 2020 of this title, or

(c) .... notice of such administrative action shall be issued to the retail food store or wholesale food concern involved. Such notice shall be delivered by certified mail or personal service. If such store or concern is aggrieved by such action, it may, in accordance with regulations promulgated under this chapter, within ten days of the date of delivery of such notice, file a written request for an opportunity to submit information in support of its position to such person or persons as the regulations may designate. If such a request is not made or if such store or concern fails to submit information in



support of its position after filing a request, the administrative determination shall be final. If such a request is made by such store or concern, such information as may be submitted by the store or concern, as well as such other information as may be available, shall be reviewed by the person or persons designated, who shall, subject to the right of judicial review hereinafter provided, make a determination which shall be final and which shall take effect fifteen days after the date of the delivery or service of such final notice of determination. If the store or concern feels aggrieved by such final determination he may obtain judicial review thereof by filing a complaint against the United States in the United States district court for the district in which he resides or is engaged in business, or in any court of record of the State having competent jurisdiction, within thirty days after the date of delivery or service of the final notice of determination upon him, requesting the court to set aside such determination. The copy of the summons and complaint required to be delivered to the official or agency whose order is being attacked shall be sent to the Secretary or such person or persons as he may designate to receive service of process. The suit in the United States district court or State court shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue. If the court determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence. During the pendency of such judicial review, or any appeal therefrom, the administrative action under review shall be and remain in full force and effect, unless an applica-

tion to the court on not less than ten days' notice, and after hearing thereon and a showing of irreparable injury, the court temporarily stays such administrative action pending disposition of such trial or appeal."

3. 7 U.S.C. § 2020 provides as follows:

"Any approved retail food store or wholesale food concern may be disqualified from further participation in the food stamp program on a finding, made as specified in the regulations, that such store or concern has violated any of the provisions of this chapter, or of the regulations issued pursuant to this chapter. Such disqualification shall be for such period of time as may be determined in accordance with regulations issued pursuant to this chapter. The action of disqualification shall be subject to review as provided in section 2022 of this title."

#### STATEMENT OF THE CASE

As portions of the record in ~~the~~ United States District Court for the Eastern District of Virginia, Norfolk Division, are relied upon hereunder and are voluminous, a separate copy of the record, as included in the voluminous Appendix heretofore filed in the United States Court

of Appeals for the Fourth Circuit is filed herewith and references to "Appendix" hereafter refer to said separate Appendix.

Rural Foods, Inc., hereinafter referred to as "Rural", was authorized to participate in the program under the Food Stamp Act of 1964, 7 U.S.C. § 2011, et seq. Rural was charged with and ultimately found to have violated certain provisions of the act wherein the penalty for such violations was disqualification from accepting food stamps as a retailer. The United States District Court for the Eastern District of Virginia filed an opinion in this cause on November 16, 1972 and held that it had no authority to review the one year sanction imposed upon Rural so long as that sanction was within the limits of the period of disqualification allowed. The District Court based its ruling on Welch v. United States, 464 F.2d 682 (4th Cir. 1972), which was the

then guiding case in the Fourth Circuit and also based its opinion upon Martin v. United States, 459 F.2d 300 (6th Cir. 1972), which decision followed the Fourth Circuit's decision.

Following an appeal of the District Court's holding and an affirmation by the Fourth Circuit, Rural applied for certiorari and was denied the same and thereafter began serving its one-year period of disqualification. While in the course of serving its one-year period of disqualification, Rural learned that the United States Court of Appeals for the Fourth Circuit decided the case of Cross v. United States, 512 F.2d 1212 (4th Cir. 1975), and it was noted that case reversed the Welch case, supra, and held that the District Court must afford review to the sanctions of disqualification in accordance with the language of that decision.

Following this, Rural filed a

motion under Rule 60(b) of the Federal Rules of Civil Procedure seeking a new trial on the issue of the validity of the one-year sanction imposed (App. 26-33 ).

In its motion (paragraphs 6, 7, 9, 11 and 12) Rural sought to obtain judicial review of the penalty imposed upon it in light of the Cross case's holding that, constitutionally speaking, "due process" requires such expanded judicial review in cases of this type. Thus, in paragraph 11 of Rural's 60(b) motion it was averred that "there are other reasons that justify relief from the operation of the said judgment (January 23, 1973) among which is the fact that plaintiff is presently being denied procedural due process by a continuation of the disqualification from the Food Stamp Program without a review of the same by this court."

Since Rural's one-year period of original disqualification began on November

22, 1974, it had served a five (5) month period of disqualification when the District Court entered an order abating the period of disqualification as of April 21, 1975 pending a hearing on Rural's 60(b) motion, a determination by the Court thereon and any appeals therefrom. This action was taken by the District Court by order of April 10, 1975, and at that time the matter was reinstated on the docket.

On July 7, 1975, evidence and arguments were presented on the 60(b) motion and on August 21, 1975, (App. 34 ), the District Court filed its opinion reducing Rural's penalty from one year to six (6) months, and an appropriate order providing such was entered by the Court on September 10, 1975 (App. 45 ).

The United States took an appeal to the United States Court of Appeals for the Fourth Circuit and on September 13, 1976 the Fourth Circuit reversed the



decision of the United States District Court.

During the evidentiary hearing, the District Court found, inter alia, that a one-year suspension from the Food Stamp Program for retailers is the maximum allowed in this type of case and that it had not been imposed in this area of the country in any other case (App. 36-7). It was also noted that the local Food Stamp Officer in charge, Leon Saunders, had made various recommendations in other cases ranging from ninety (90) days disqualification to one year and that in most cases his recommendation had been reduced. However, in this case he had recommended six (6) months disqualification but the period of disqualification had been increased (App. 37 ). The District Court further found that during Rural's period of disqualification hereunder (prior to reinstatement), Rural had a substantial

decline in gross sales and a significant decline in payroll (App. 37-8).

The District Court further reviewed the regulations of the Food Stamp Program (4th Cir. App. p. 133-146) and after a full discussion thereof and their application to the case at hand, including the testimony of Mr. Saunders, noted that these regulations provided that "the need to disqualify must never obscure the need to treat retailers consistently ... and must be given a fair opportunity to abide by the regulations ...." (App. 42 ). Thus, the District Court finally held that after "(w)eighing all of the factors and the criteria prescribed by the Regulations by fixing the period of suspension it seems to me the facts bring this case within the six-month suspension period."



### ARGUMENT

Since the United States Court of Appeals for the Fourth Circuit assumed, without deciding, that the District Court had jurisdiction to reopen and reconsider the question previously decided, upon application under Rule 60(b) of the Federal Rules of Civil Procedure, this Petition does not address itself to the jurisdictional question. But should the Court be concerned with the question of jurisdiction, then it is submitted that the Fourth Circuit's handling of a 60(b) motion in Tribble v. Bruin, 279 F.2d 424 (4th Cir. 1960) is applicable.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REDUCING THE ONE-YEAR PERIOD OF DISQUALIFICATION TO SIX MONTHS:

Given the fact that the District Court had jurisdiction to review, under the Cross decision, supra, the period of disqualification that Rural was in the

process of serving, it is the contention of Rural that the court ruled correctly when it held that "(w)eighing all of the factors and criteria prescribed by the Regulations for fixing the period of suspension it seems to me the facts bring this case within the six months suspension period."

The law incident to appellate review of the grant of relief under Rule 60(b) clearly states that to overturn the District Court there must be a "clear showing of abuse of discretion", Lohman v. General Amer. Life Ins. Co., 478 F.2d 724, since a Rule 60(b) grant of relief involves appraisal of facts--a form of appraisal "largely within the discretion of the trial court," ibid. The District Court's opinion and the record in this case clearly demonstrate that the court's appraisal of the facts, as well as its juxtapositioning of those facts to the standards established

in the Cross decision, was not abusive of the Court's discretion.

Indeed, the Cross decision addressed itself to the standards of judicial review that are applicable to a case of this nature and, while the Fourth Circuit, in its decision addressed those standards generally, they failed to note that the District Court in its opinion addressed these very same standards, but applied them differently. Thus, while the Fourth Circuit went to some lengths to point out that there are agency guidelines, they assiduously avoided the numerous references therein to the fact that consistency is an important criteria to be used in the determination of the penalties to be imposed. These criteria even went so far, within their own body, to underline and underscore the fact that it deemed it highly important that previous cases which were "similar in nature" should be compared

to the penalty to be prescribed in a given case.

This form of comparison, in fact, was undertaken by the District Court from a review of the record, and the District Court found upon review of previous penalties that plaintiff's penalty of one year did not "follow rationally from the facts," Cross v. United States, supra at 1217. Contrary to the United States' charges, the District Court, while acknowledging the limited scope of review involved therein, neither relied upon any single factor nor ignored the standards of the Cross decision. In contradistinction, the District Court catalogued the numerous factors that went into its opinion, and thereupon found that the agency's decision was arbitrary and capricious to the extent that it was not following its own criteria in assessing plaintiff with a one-year penalty. The fact that the District Court

used the word "seems" when referring to the Court's final holding on the facts, does not negate the Court's finding from a weighing of all of the factors and criteria that a six-month period of disqualification in this case was in order. By its very holding, the lower court clearly indicated that it was not imposing its own view as to what the penalty should be, but rather it was imposing a period of disqualification that it found to be consistent with the agency's own written criteria. Quite apparently, the District Court found sufficient "excessive variance", Cross v. United States, supra at 1217, n. 8, along with other factors to cause it to reach its ultimate decision. The Cross decision noted that an agency "must" abide by its regulations, id. at 1218, n. 9, and it is apparent to Rural that the United States and the Fourth Circuit seek to avoid such a requirement by ignoring

portions of those regulations as the same are applicable to this case. Thus, while the District Court recognized the regulatory mandate that requires "the need to treat retailers consistently", the opinion of the Fourth Circuit avoids reference to this regulatory language and makes a mockery of the Cross decision by effectively going back to the old standard under Welch, supra. Suffice to say that the District Court listened to the evidence in all of these prior cases, and its appraisal of the facts led the Court to a contrary view upon a comparison of those cases to the case at bar.

What the Fourth Circuit has failed to recognize is that the decision of the District Court was based upon its overview of each of the relevant factors of review taken as a whole. While no one specific factor may have influenced the lower court over another factor, it clearly



appears to Rural that the District Court had sufficient facts before it to justify each of the individual factors it considered and, in like manner, it had sufficient facts before it to justify the Court's conclusion of the sum of the facts.

It should be noted that the Fourth Circuit's opinion merely states that it is "clear" that Rural's actions fell within the Department of Agriculture's criteria for a one-year period of disqualification. This view was discredited in the Cross decision as being a controlling factor upon review. This being the case the Fourth Circuit gave no reference, nor did it find that the District Court abused its discretion in reducing the penalty prescribed against Rural. See Lohman v. General Amer. Life Ins. Co., supra. This form of Fourth Circuit review certainly is contrary to the scheme of review contemplated in both the Cross decision

and in the general law of judicial review.

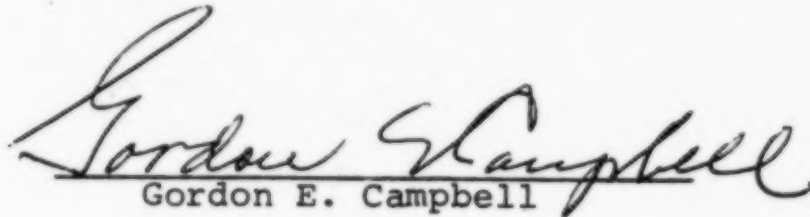
#### CONCLUSION

For the reasons above stated the Petitioner, Rural Foods, Inc., prays that its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be granted.



CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Revised Rules of the Supreme Court of the United States, I hereby certify that pursuant to Section 2(a) thereof personal service of this petition has been made on the 13th day of December, 1976, upon all parties required to be served, the same being the Solicitor General as well as the United States Department of Agriculture.

  
Gordon E. Campbell

**APPENDIX**

UNITED STATES COURT OF APPEALS

For the Fourth Circuit

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No. 76-1103

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Rural Foods, Inc.,  
t/a Shop and Save Super Markets,

Appellee,

versus

The United States  
(U.S. Department of Agriculture,  
Food and Nutrition Service),

Appellant.

---

Appeal from the United States District Court  
for the Eastern District of Virginia, at  
Norfolk. Richard B. Kellam, District Judge.

---

Argued June 9, 1976

Decided Sept. 13, 1976

---

Before CRAVEN and RUSSELL, Circuit Judges,  
and MARKEY, Chief Judge, United States Court  
of Customs and Patent Appeals.\*

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\*Sitting by Designation.

PER CURIAM:

This is an appeal by the United States (Department of Agriculture) from a decision of the district court reducing the sanction imposed by the Department upon the defendant food store for its violations of the Food Stamp Act of 1964, 7 U.S.C. § 2201 et seq., and the regulations promulgated pursuant to the Act. It was settled long ago, in prior proceedings also the subject of appeal, that Rural Foods flagrantly violated the Act and the regulations by purchasing coupons for cash and selling ineligible items. Indeed, the district judge in the order that was the subject of the prior appeal affirmed the one-year sanction imposed by the Department. But after that decision, and our affirmance of it, we held in Cross v. United States, 512 F.2d 1212 (4th Cir. 1975), that the district courts are empowered to review the sanction determination of the Secretary to determine whether it is arbi-

trary and capricious. However, we termed the Secretary's prescription of periods of disqualification and definition of categories of violations as "entitled to very great, if not conclusive, weight." 512 F.2d at 1218.

Based on our Cross decision Rural Foods moved the district court to reopen the case and reconsider whether the sanction imposed by the Secretary should be diminished.

Assuming, without deciding, that the district court had jurisdiction to reopen and reconsider the question previously decided,<sup>1</sup> we hold that its determination of the "reasonableness of the penalty imposed" was not warranted by the limited scope of review and the test articulated in Cross. Herling's Grocery Basket, Inc. v. United States, No. 75-1847 (May 17, 1976). It is

1.

Fed. R. Civ. P. 60; 11 Wright & Miller, Federal Practice and Procedure §§ 2868, 2873 (1973); cf. Tribble v. Bruin, 279 F.2d 424 (4th Cir. 1960).

clear that defendant's extreme transgressions fell within the Secretary's criteria and definitions for a one-year period of disqualification. Since his determination was not "unwarranted in law or without justification in fact" the sanction was neither arbitrary nor capricious, and the district court was without authority to reduce it to six months. 512 F.2d at 1218.

On remand the district court will determine how long the defendant has already been deprived of participating in the Food Stamp Program, and will then order a further deprivation until the Secretary's one-year sanction has been exhausted.

REVERSED.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

RURAL FOODS, INC., )  
t/a SHOP AND SAVE SUPER )  
MARKETS, )  
 )  
Petitioner, )  
 ) CIVIL ACTION  
-vs- )  
 ) NO. 671-71-N  
THE UNITED STATES )  
(U. S. DEPARTMENT OF )  
AGRICULTURE, FOOD AND )  
NUTRITION SERVICE, )  
 )  
Defendant. )

Serve:

U. S. Department of  
Agriculture, Food and  
Nutrition Service,  
Southeastern Region,  
1795 Peachtree Road, N.E.,  
Room 302,  
Atlanta, Georgia 30309

COMPLAINT

TO: THE HONORABLE JUDGES OF THE COURT  
AFORESAID:

1. Petitioner, Rural Foods, Inc.,  
t/a Shop and Save Super Markets, is a Vir-  
ginia Corporation engaged in the retail food  
business in Portsmouth, Virginia, which is  
within the jurisdiction of this Court.

2. That on or about April 28,  
1971, the U. S. Department of Agriculture,  
Food and Nutrition Service, 1795 Peachtree  
Road, N.E., Room 302, Atlanta, Georgia 30309,  
by Certified Mail, Return Receipt Requested,  
specified charges against the petitioner  
for alleged violations of the Food Stamp  
Program, 7 C.F.R. 1600-1604 (Renumbered  
7 C.F.R. 270-274 on December 30, 1970,  
hereinafter referred to as "The Regulations"),  
the petitioner being a participant in the  
Food Stamp Program in the normal and usual  
course of operating its aforementioned retail  
food business in Portsmouth, Virginia.

3. On July 7, 1971, the same said  
agency which had made the charges, as afore-  
mentioned, by like Certified Mail, Return  
Receipt Requested, advised petitioner that  
pursuant to Section 272.6(c) of the Food  
Stamp Regulations (36 F.R. 14113), it was  
the determination of the Director, Food  
Stamp Division, Food and Nutrition Service,



U. S. Department of Agriculture, that the petitioner had violated certain regulations of the Food Stamp Program and as a consequence should be disqualified from the privilege of participating in the Food Stamp Program for a period of one (1) year.

4. On July 12, 1971, Rural Foods, Inc., by counsel, advised the Food Stamp Review Officer, U. S. Department of Agriculture, Washington. D. C., that pursuant to Section 273.5 et seq., of the Food Stamp Regulations (36 F.R. 14114), petitioner desired and requested a review of the aforesaid determination of the Food and Nutrition Service, Atlanta, Georgia, by the Food Stamp Review Officer, Washington, D. C.

5. That on August 10, 1971, and thereafter, petitioner made certain submittals to the Food Stamp Review Officer aforementioned and, further, requested and had a personal conference with said Food Stamp Review Officer.

6. That on November 3, 1971, counsel for petitioner by Certified Mail, Return Receipt Requested, received written determination of the Food Stamp Review Officer aforementioned, dated October 29, 1971, which determination upheld the proposed one (1) year period of disqualification as proposed by the Director of the Food Stamp Division aforementioned.

7. That Rural Foods, Inc., t/a Shop and Save Super Markets is aggrieved by the determination of the Food Stamp Review Officer aforementioned which was received on November 3, 1971 as aforementioned.

8. Petitioner is aggrieved on the following grounds, to-wit:

A. That the charges as preferred by letter dated April 28, 1971, aforementioned, and found to have been substantiated in fact or in law and petitioner is entitled in accordance with Section 273.10 of the Food Stamp Regulations (36 F.R. 14115)

is entitled to a trial de novo on said charges requiring the United States to prove said charges to the satisfaction of the Court, petitioner denying each of the charges as made.

B. That the proposed disqualification of the privilege in the participation in the Food Stamp Program for a period of one (1) year is harsh, unfair, and improper under the circumstances in the facts contained in the case at bar.

9. That the alleged violations of April 28, 1971, as aforementioned should, in a trial de novo be reviewed by the Court to determine the validity of the questioned administrative action in issue by reason of the fact that the said alleged charges are without substantiation both legally and factually.

10. That in accordance with the Food Stamp Regulations applicable thereto the Court should hear evidence and determine

whether or not said aforementioned administrative action is invalid, in whole or in part, and that the Court should enter such judgment or order as it determines is in accordance with the law and the evidence.

11. That during the pendency of this judicial review, or any appeal therefrom, the administrative action under review should be stayed in that said proposed disqualification will result in irreparable injury to petitioner on the following grounds.

A. That petitioner is entitled under Food Stamp Regulations to a trial de novo by the Court and that a disqualification of petitioner during the pendency of said action would totally bankrupt petitioner, putting the same out of business and thereby render moot its right to a trial de novo.

B. The petitioner has a major investment in plant, machinery and inventory, which investment would be lost during the pendency of this action if the

administrative action in question is not stayed during the pendency of this appeal de novo.

C. That irreparable injury will be done in like manner to those persons who are patrons of Rural Foods, Inc., t/a Shop and Save Super Markets.

D. Upon such other showing of irreparable injury as may be presented to the Court at a hearing on a motion to stay the administrative action in question.

WHEREFORE, petitioner moves the Court to hear the above matter on a trial de novo and to render its judgment or order as it determines in accordance with the law and the evidence.

RURAL FOODS, INC.,  
T/A SHOP AND SAVE SUPER MARKETS

BY: /s/ Martin Glaser  
President

STATE OF VIRGINIA,  
CITY OF NORFOLK, to-wit:

This day personally appeared before me, Martin Glaser, President, Rural Foods, Inc., t/a Shop and Save Super Markets, and made oath that all of the above is true and correct according to his knowledge, information and belief.

Given under my hand this 3rd day of November, 1971.

My commission expires January 5, 1973.

/s/ Edna B. Burnell  
Notary Public

Campbell, Lustig & Hancock, p.q.,  
1340 Virginia National Bank Building,  
Norfolk, Virginia 23510

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

RURAL FOODS, INC.,	)	
t/a SHOP AND SAVE SUPER	)	
MARKETS,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	NO. 671-71-N
THE UNITED STATES	)	
(U. S. DEPARTMENT OF	)	
AGRICULTURE, FOOD AND	)	
NUTRITION),	)	
	)	
Defendant.	)	

O P I N I O N

Rural Foods, Inc. (Rural) was authorized to participate in the program under the Food Stamp Act of 1964, 7 U.S.C. § 2011, et seq. Rural was charged with and found to have violated the rules and regulations promulgated pursuant to the Act. This Court's Opinion was filed November 16, 1972. In that Opinion the Court held that it had no authority to review the sanctions imposed beyond determining that they were in accordance with the statute and regu-

lations. That is, the Court had no authority to review, change or amend the period of disqualification. The Court based its ruling on Welch v. United States, 464 F.2d 682 (4th Cir. 1972); Martin v. United States, 459 F.2d 300 (6th Cir. 1972); Save More of Gary, Inc. v. United States, 442 F.2d 36 (7th Cir. 1971), cert. denied 404 U.S. 987 (1972), and other cases cited in the Opinion. On appeal the Fourth Circuit affirmed on January 16, 1974.

Thereafter, the Fourth Circuit, sitting en banc, decided the case of Cross v. United States, 512 F.2d 1212 (4th Cir. 1975), and held that the district court must afford review to the sanctions of disqualification, and that the punishment follow rationally from the facts, be authorized by the statute and regulations, and aimed towards fulfillment of the Act's purposes.

Following that decision Rural moved this Court, pursuant to Rule 60(b)



of the Federal Rules of Civil Procedure to grant him a new trial on the issue of the validity of the sanctions imposed in this case. Rural says that since the Fourth Circuit said in the Cross case that the district court "must" afford a review of the administrative sanctions of disqualification, it is entitled to have the Court hear this issue.

By order of April 10, 1975, this case was reinstated on the docket for the Court to review the validity of the administrative sanctions heretofore imposed on Rural, and defendant was ordered to reinstate Rural in the Food Stamp Program until the further order of the Court.

Evidence and arguments were presented to the Court on July 7, 1975. It appears from the facts that the one year suspension imposed in this case is the maximum allowed, and that it has not been imposed in this area in any other case. Leon

Saunders, the officer in charge of the Norfolk Field Office of the Stamp Program related that he had conducted investigations on other suspensions and made recommendations of the actions to be taken. In other cases his recommendations of periods for suspension had been reduced. In one he recommended 90 days and the Regional Office reduced it to 60 days; in the second one he recommended six months and the Regional Office reduced it to 90 days; in the third he recommended 90 days and the Regional Office approved; in the fourth he recommended a year and the Regional Office reduced it to six months. In Rural's case he recommended six months, but the Regional Office increased it to one year.

Rural filed as an exhibit a statement of its gross sales for the periods prior, during and subsequent to the suspension of its right to participate in the Food Stamp Program. (Ptf. Ex. 1). It

established substantial decline in its gross sales. For instance, for the full month of October 1974 prior to suspension, the sales amounted to \$157,600.00. In December, the first full month after suspension, sales were \$122,900.00. For April 1975, just prior to restitution to the Program, sales were \$105,500.00, whereas, May 1975, the first month after restitution, the sales were \$148,000.00. The same type reduction is shown by Rural's payroll figures.

Rural says that the sanctions imposed in this case were not in accordance with the regulations of the Food Stamp Program. For instance, it says that the regulations provide that where there has been a prior period of disqualification, thereafter the periods of disqualification will "result in stronger final determinations." (Ptf. Ex. 3, page 8, ¶3). The "Criteria for Final Determinations" as set out in the instructions for dealing with violations says

that the reviewer "should attempt to choose a determination which is both reasonable and consistent with previous determinations in similar cases," and that it is highly important to review previous similar cases and compare them with action to be taken. (Ptf. Ex. 3, page 9). Under criteria for six months disqualifications, it provides that such period will be assigned for retailers -

(1) Where the evidence shows the retailer, as a matter of store policy, is engaged in discounting coupons for cash to a limited extent, and any violations which show a delinquency and widespread disregard for program regulations.

(2) Stamp Program personnel have taken significant compliance action to prevent violations, and the evidence shows that the retailer, as a matter of store policy, is engaged in sale of common grocery type ineligible items, etc.

As I read the Cross case, the district court in a de novo hearing shall determine whether the Secretary "has abused his discretion by action arbitrarily or capriciously," and if so the district court

should modify the penalty within the guidelines set by the Secretary.

The matter was originally before the Court in September 1972. No consideration was then given to the question of the reasonableness of the penalty imposed. This was in keeping with Welch, supra. Now that Welch, supra, has been overruled, the Court is asked to consider this question. The Court must do so in light of all the facts and circumstances. Rural says the Court should also consider the fact that some of its officers and employees were prosecuted for alleged violations of the Act and acquitted.

It is quite clear that at the time of the original trial of this case, if the Court rulings had then permitted it, the Court would have made extensive inquiry into the issue of the reasonableness of the sanctions imposed.

In Cross, supra, the Court said

that "disqualification may have grave economic consequences to a retailer engaged in business in a depressed economic area where there is widespread use of food stamps. In such an area one who holds himself out as a retailer of food would be cut off from a substantial segment of the buying public if he is disqualified from engaging in food stamp transactions." (512 F.2d 1212). The evidence shows this to be the situation here.

Taking into account the Court's language in the Cross case, supra, that due process requires "that the punishment follow rationally from the facts," (page 1217) and that excessive variances, sometimes more striking than "mere unevenness" would be evidence of arbitrary or capricious action, because in that instance it may well be concluded that the Secretary failed to observe his own regulations and therefore the sanction be unwarranted, and further taking into account the fact that the officer



in charge of the Norfolk Office recommended a suspension of six months, and that there had been no other suspension for as much as a year, together with the fact that the evidence establishes the financial loss to Rural has been great - not to mention fees and costs of litigation - the penalty does not seem to be in keeping with that imposed in other cases. In the Instructions (Ptf. Ex. 3) and Regulations, it is pointed out that "the need to disqualify must never obscure the need to treat retailers consistently . . . and must have been given a fair opportunity to abide by the regulations . . . ." (P. 2). For instance, in the criminal prosecution it was clearly established that some violations occurred at the request of the Welfare Department, and others, to enable those eligible for food stamps to obtain food when the recipient did not obtain or timely receive stamps.

It is most difficult for a court

to say that the suspension in a particular case is too harsh or too lenient, or what period of suspension should have been applied. Too, I am most reluctant to attempt to interfere with the decisions of those charged with administering the Stamp Program. Weighing all of the factors and the criteria prescribed by the Regulations for fixing the period of suspension it seems to me the facts bring this case within the six months suspension period.

Therefore, the period of suspension of Rural from participating in the Stamp Program is amended and fixed at a total period of six months.

Counsel will within ten days present a proper Order in accordance with this Opinion, and provide therein that if either party shall desire to appeal from this determination the effect of this Order shall be stayed pending appeal, and the status quo will continue until the further Order of



this Court.

/s/ Richard B. Kellam  
United States District Judge

Norfolk, Virginia

August 21, 1975.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

RURAL FOODS, INC.,	)	
t/a SHOP AND SAVE SUPER	)	
MARKETS,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION
v.	)	
	)	NO. 671-71-N
THE UNITED STATES	)	
(U. S. DEPARTMENT OF	)	
AGRICULTURE, FOOD AND	)	
NUTRITION),	)	
	)	
Defendant.	)	

O R D E R

This cause came on this day upon motion of the plaintiff, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and upon Order of the Court of April 10, 1975, that this case be reinstated on the docket of the Court to review the validity of the administrative sanctions heretofore imposed upon plaintiff by the United States Department of Agriculture, and upon evidence and arguments presented before the Court on

July 7, 1975, and in accordance with this Court's opinion rendered in this cause on August 20, 1975, it is accordingly

ADJUDGED, ORDERED and DECREED that the period of suspension of plaintiff from participation as a retailer under the Food Stamp Act of 1964, 7 U.S.C. Sec. 2011, et seq., be and the same hereby is affixed at a total period of six (6) months and said plaintiff shall be credited with having been suspended from said program for a period of five (5) months, and there shall remain to be served by plaintiff a period of one (1) month's suspension under the afore-said program.

It is further ORDERED that the balance of the six months' suspension afore-said shall begin on October 15, 1975, provided, however, that if either party shall appeal from this determination the effect of this Order shall be stayed pending such appeal, and plaintiff shall be entitled to

continue to participate in the program afore-said in accordance with this Court's Order of April 10, 1975 and until further Order of this Court, to all of which action the defendant does object and except.

ENTER:

/s/ Richard B. Kellam  
JUDGE

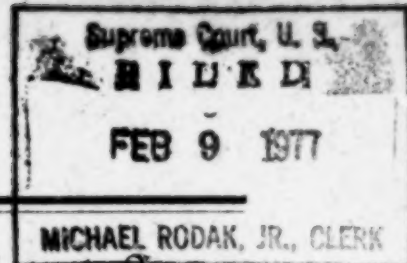
ASKED FOR:

/s/ Wayne Lustig, p.q.

SEEN AND EXCEPTED TO:

/s/ James A. Oast, Jr., p.d.

No. 76-797



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*In the Supreme Court of the United States*

OCTOBER TERM, 1976

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RURAL FOODS, INC., PETITIONER

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

---

DANIEL M. FRIEDMAN,  
*Acting Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

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**In the Supreme Court of the United States**

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**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

---

In November 1971, petitioner, Rural Foods, Inc., a retail food store, brought suit in the United States District Court for the Eastern District of Virginia, seeking to set aside a determination by the Department of Agriculture disqualifying petitioner from participating in the federal food stamp program for a period of one year. The disqualification was based upon administrative findings that petitioner had committed thirteen separate violations of the Food Stamp Act of 1964 and implementing regulations.

Under Section 11 of the Food Stamp Act of 1964, 78 Stat. 703, 7 U.S.C. 2020, the Secretary is directed to disqualify a retail food store from participating in the food stamp program "on a finding \* \* \* that such store \* \* \* violated any of the provisions of the [A]ct, or of the regulations issued pursuant to the [A]ct." The disqualification "shall be



for such period of time as may be determined in accordance with regulations issued pursuant to this [Act]." *Ibid.* Under regulations promulgated by the Secretary, a food store found in violation of the Act or regulations may be disqualified "for a reasonable period of time, not to exceed three years \* \* \*." 7 C.F.R. 272.6(a).<sup>1</sup> Pursuant to 7 U.S.C. 2022(c), a store aggrieved by a final administrative determination may seek judicial review in a district court "to set aside such determination" and such review "shall be a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue."

After disqualification by the Department of Agriculture, petitioner sought review in the district court, denying that the charged violations had occurred, and claiming that, in any event, the one-year sanction was harsh and unfair. After a hearing, the district court upheld the disqualification action, finding that petitioner had committed each of the thirteen charged violations. The court held that it had no authority to review the sanction imposed, relying on the then controlling Fourth Circuit precedent, *Welch v. United States*, 464 F. 2d 682. The court of appeals affirmed, 489 F. 2d 754, and this Court denied certiorari, 419 U.S. 827.

Some months later the Fourth Circuit in an *en banc* decision, *Cross v. United States*, 512 F. 2d 1212, overruled *Welch* and held that the courts had the authority to modify a period of disqualification determined to be arbitrary and

<sup>1</sup>Guidelines have been issued by the Food and Nutrition Service (FNS), Department of Agriculture, to responsible agency officials setting forth criteria for imposition of particular periods of disqualification within the three-year range specified in the regulation. See FNS (FS) Instruction 744-9, issued March 13, 1970. A copy of these guidelines, introduced as plaintiff's exhibit No. 3 at the July 7, 1975 district court hearing, was reproduced in the Joint Appendix (pp. 133-146) filed with the Court of Appeals (hereinafter referred to as "J.A.").

capricious. Upon petitioner's motion, the district court, pursuant to Rule 60(b)(5) and (6), Fed. R. Civ. P., reinstated petitioner's case for trial on the validity of the period of disqualification and, after further proceedings, ordered the period reduced from one year to six months (Pet. App. 46). According to the district court, "[w]eighing all of the factors and the criteria prescribed by the Regulations for fixing the period of suspension it seems to me the facts bring this case within the six months suspension period" (Pet. App. 43).

The court of appeals reversed. The court emphasized that the sanction imposed by the Secretary was to be given " 'very great, if not conclusive, weight,' " and held that the lower court's determination that a six-month rather than a one-year sanction was called for in this case "was not warranted by the limited scope of review and the test articulated in *Cross*" (Pet. App. 24). The court of appeals stated (Pet. App. 24-25):

It is clear that [petitioner's] extreme transgressions fell within the Secretary's criteria and definitions for a one-year period of disqualification. Since his determination was not "unwarranted in law or without justification in fact" the sanction was neither arbitrary nor capricious, and the district court was without authority to reduce it to six months.

The court of appeals' decision is correct; further review by this Court is not warranted.

1. The one-year disqualification fixed by the agency on account of petitioner's numerous and serious violations of the Food Stamp Act of 1964 and implementing regulations is valid. Where, as here, "Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.' " *Butz v. Glover Livestock Commission Co.*,

411 U.S. 182, 185. An administrative sanction is not to be overturned upon judicial review unless it is either unwarranted in law or without justification in fact (*id.* at 185-186).

Petitioner committed numerous serious violations of the Food Stamp Act of 1964 and regulations. The evidence establishes that petitioner discounted food stamps for cash and accepted food stamps in exchange for alcoholic beverages and other major nongrocery items (J.A. 11-20, 48-53). The violations were committed after petitioner had been visited on two occasions by FNS officials to ensure petitioner's compliance with food stamp regulations; the participation in these illegal sales by management personnel demonstrated that they were matters of store policy (J.A. 48-53, 147, 149). Under the agency guidelines, a one-year sanction is indicated where the retailer as a matter of store policy has discounted food stamps for cash or accepted food stamps for alcoholic beverages (J.A. 143-144). The one-year disqualification imposed by the agency here was not "unwarranted in law or unjustified in fact."

2. Petitioner contends (Pet. 16-19), however, that absent an abuse of discretion, the court of appeals should not have upset the district court's assessment that a six-month penalty was called for under the pertinent criteria, especially in light of more lenient sanctions imposed in similar cases.

It is the agency's, not the district court's, determination that is ultimately the subject of review, and the agency's view as to the appropriate sanction must be afforded "very great, if not conclusive, weight." *Cross v. United States*, *supra*, 512 F. 2d at 1218. See also *Camp v. Pitts*, 411 U.S. 138. Under the agency guidelines, a six-month sanction is too lenient where the retailer has discounted food stamps for cash or, after compliance action by the agency, accepted food stamps for major non-grocery items (J.A. 144). Moreover, similar violations need not always result in similar

sanctions.<sup>2</sup> "The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases." *Butz v. Glover Livestock Commission Co*, *supra*, 411 U.S. at 187.<sup>3</sup>

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,  
Acting Solicitor General.

FEBRUARY 1977.

<sup>2</sup>The district court noted that of the four other food stores in the area found to be in violation of the food stamp regulations, none had received a one-year suspension (Pet. App. 42a). The evidence presented below demonstrates that in three of those cases, however, either the violations did not approach the magnitude and seriousness of those here or there had not been sufficient compliance action by FNS personnel to warrant a one-year penalty (J.A. 88-92, 114-130). Only in one case did the circumstances even approximate those involving petitioner (J.A. 93-94); that store received a six-month sanction. That one instance would not warrant overturning the one-year sanction imposed by the agency here. See *Butz v. Glover Livestock Commission Co.*, *supra*, 411 U.S. at 188; *Cross v. United States*, *supra*, 512 F. 2d at 1217, n. 8.

<sup>3</sup>Contrary to petitioner's argument (Pet. 17-18), the agency did not ignore its own regulations (the FNS guidelines) in imposing a one-year sanction. The circumstances surrounding petitioner's violations clearly satisfied the criteria for a one-year disqualification.